IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LFONSO HERRERA BOJORQUEZ, No. 21938

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Dennis J. Donovan, District Judge

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX
(Rule 18-2(a))

TABLE OF AUTHORITIES CITED
(Rule 18-2(a))

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JURISDICTION
(Rule 18-2(b))

Appellant was indicted in the United States District Court for the Southern District of California upon charges of smuggling marijuana and of concealing and facilitating the transportation and concealment of illegally imported marijuana in violation of Title 18, United States Code, Section 176a. (R. 2-3). He was convicted on both counts. (R. 7-8). The District Court had jurisdiction under Title 18, United States Code, Section 3231. This Court has jurisdiction to review the judgment of conviction under Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE
(Rule 18-2(c))

The indictment charged in Count One that appellant on or about December 12, 1966, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 218 pounds of marijuana. (R. 2). Count Two charged that appellant with intent to defraud the United States knowingly concealed and facilitated the transportation and concealment of approximately 218 pounds of marijuana which he knew had been imported into the United States contrary to law. (R. 3).

In a jury trial appellant was found guilty as to both counts of the indictment. (R. 7-8). He was committed to the custody of the Attorney General for concurrent five year sentences on each count, with a recommendation that he be considered for parole prior to the expiration of the sentence. (R. 8).

Evidence

On December 12, 1966, appellant drove an automobile from Mexico to the Port of Entry at San Ysidro, California. (R.T. 6-7, 13). He presented his immigration card and made a negative customs declaration. (R.T. 7-9). The inspector became suspicious, because appellant appeared to shake or tremble. (R.T. 7,9). Upon searching the auto-

mobile customs officials discovered 218 pounds of marijuana concealed within the front door panels, within and under the rear seat, and in the panels below the rear windows. (R.T. 9-10, 15-17, 50-54).

The automobile driven by appellant was registered in the name of Mr. and Mrs. Powell. It had been sold or traded to University Ford in San Diego and subsequently sold in a package deal with other used cars to Metorez Universal in Tijuana, Mexico, which at the time of trial was a defunct agency. (R.T. 26).

Appellant was arrested and interrogated by customs officers. He stated that he had picked up the vehicle in Tijuana after he had been contacted by one Roberto, a Mexican fellow, who had asked the defendant to bring the car to the Mission Valley Car Wash where the defendant stated that he had previously been employed. He was to ask for permission to use the equipment at the car wash, polish the car and return it to Tijuana. Appellant did not give the officers Roberto's last name. The officer either thought or was certain that appellant stated that Roberto gave him $0.00 to have the work done or to do it himself. (R.T. 22-24, 85). At the time of his arrest appellant had $56.00 in his wallet. (R.T. 24).

According to Customs Agent Ellis the 218 pounds of approximately 100 kilos of marijuana found in the

automobile was worth approximately $30.00 per kilo or $,000.00 in Tijuana. He also testified that the same quantity of marijuana would be worth $218,000.00 on the illicit market in the United States. (R.T. 27). The ordinary fee to a, "mule", for driving an automobile load of marijuana across the border is $20.00 to $25.00. If they make a delivery in Los Angeles, they usually receive $50.00 to $100.00. (R.T. 86).

Appellant testified in his own behalf. He denied that he knew there was marijuana in the automobile when he drove it to the border. (R.T. 62-63). On the day in question one Jose Roberto Guiterez delivered the automobile to him in Tijuana to take to San Diego to clean and polish it, and, if he had a chance, to wash the upholstery and clean the motor. He received $20.00 for the work. Adequate facilities for cleaning the motor and certain cleaning products were not readily available to do the work in Tijuana. Appellant had been employed by the Minuteman Car Wash in the Mission Valley section of San Diego, where it was his custom to bring automobiles from Tijuana to clean and polish. (R.T. 58-61).

Alfonso Rodriguez testified on direct examination that he was the manager of the motor polishing department of the Mission Valley Car Wash. Appellant had been employed there, and Rodriguez did from time to time permit

him to use the equipment at the car wash to clean and polish automobiles which he brought from Tijuana. (R.T. 75-78).

Customs Agent Thane Ellis testified in rebuttal that there are car washing and motor cleaning facilities in Tijuana. (R.T. 85). He also stated, without objection by defense counsel, that he had talked with a Mr. Esquilera, the manager of the Mission Car Wash in Mission Valley, who told him that appellant had been laid off approximately four months previously because of lack of work and that employees were not permitted to bring vehicles to wash on their own or to use the facilities for that purpose. (R.T. 89). There is also a Minuteman Car Wash in Mission Valley, but appellant had referred to the Mission Car Wash at the time of his arrest. (R.T. 90).

On surrebuttal Mr. Rodriquez testified that he and appellant worked at the Minuteman Car Wash. (R.T. 92).

Questions Involved

1. Was the circumstantial evidence of appellant's knowledge of the presence of the marijuana in the automobile at the time he entered the United States sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt?

2. Was appellant's Sixth Amendment right to the effective assistance of counsel violated, where his trial

ounsel failed to make a motion for acquittal, failed to
oject to inadmissible hearsay evidence which probably
pejudiced his defense, and failed to effectively clarify
fctual questions as to the application of the hearsay?

SPECIFICATION OF ERRORS
(Rule 18-2(d))

1. Appellant's sole defense in the trial court was that he did not know the marijuana was in the automobile. (R.T. 98). However, trial counsel failed to make a motion for acquittal. He objected to the introduction of the marijuana in evidence, but only upon the ground of a defect in the chain of custody. (R.T. 51-52). If appellant's contention is not sufficiently raised by its assertion as a defense in the trial court, then it must be urged as plain error.

2. The denial of appellant's right to effective representation of counsel was not raised in the trial court. By their nature such objections are not ordinarily so raised, and under the applicable rules the inadequacy of representation must be so gross as to be regarded as plain error.

ARGUMENT
(Rule 18-2(e))

Summary

The evidence of guilt was insufficient to support the conviction, in that it failed to exclude the reasonable hypothesis that appellant innocently brought the marijuana into the United States without knowing that it was in the automobile.

Appellant's only defense was effectively emasculated, because trial counsel made no motion for acquittal, failed to object to inadmissible hearsay evidence which the jury may have thought destroyed appellant's credibility, and failed to take action to clarify confusion as to the applicability of the hearsay.

I

THE CIRCUMSTANTIAL EVIDENCE DOES NOT SUPPORT APPELLANT'S CONVICTION, BECAUSE IT IS INSUFFICIENT TO ENABLE A REASONABLE DETERMINATION THAT IT EXCLUDES THE HYPOTHESIS THAT APPELLANT INNOCENTLY IMPORTED THE MARIJUANA WITHOUT KNOWING THAT IT WAS IN THE AUTOMOBILE.

The evidence in the case at bar tending to show that appellant knew that the marijuana was in the automobile and intended to smuggle it into the United States was entirely circumstantial. The trial court so instructed the jury. (R.T. 112).

> "While circumstantial evidence may support a conviction, it must be adequately sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt." (WHALEY vs. UNITED STATES, 362 F.2d 938, 939 (9 Cir. 1966); DAVIS vs. UNITED STATES, No. 21,354, ___F.2d___, (9 Cir., August 17, 1967)).

In DAVIS the appellant was arrested after being followed from the international border to the point of arrest. From there she was transported in a sheriff's vehicle. The next day heroin was found in the seat of the

sheriff's car where appellant had been sitting. The officer having charge of the vehicle could not with certainty exclude the possibility that the contraband was in the vehicle before Davis was transported, and despite repeated subsequent observations of the car, the contraband was not found until the next day. In these circumstances this Court held the circumstantial evidence insufficient.

The case at bar differs from DAVIS in that here the evidence excludes the possibility that the contraband was placed in the automobile after appellant was separated from it, but here there was much more opportunity for the marijuana to have been placed in the car without appellant's knowledge before appellant started to drive it. The fact that DAVIS involved a sheriff's vehicle made it less probable there than here that some third party placed the contraband in the car. The fact that in the case at bar the automobile had recently been in Mexico rather than in the United States in no way tends to increase the likelihood that the defendant rather than some other person placed the marijuana in the car.

Appellant has not contradicted the Government's evidence in any substantial respect. That evidence admits of at least two reasonable hypotheses. Either appellant smuggled the marijuana, or the true smuggler adopted a

scheme, whereby appellant would unknowingly and innocently bring the marijuana into the United States, and the smuggler would retrieve it after it had been introduced. The case for appellant's innocence is supported by his uncontradicted and corroborated explanation as to an innocent reason for bringing the car to the United States. Moreover, in view of the Government's practice of trading, "tax counts", for information about smuggling confederates, professional smugglers are probably motivated to carry on their activities in such a fashion that the person doing the transporting has as little information as possible to give. That would be best achieved by using a wholly innocent, "mule".

Although he insists he is not, appellant in the case at bar might be guilty. However, the evidence against him is wholly circumstantial. The hypothesis of innocence here is far more convincing than it was in DAVIS. Therefore, the evidence is insufficient to support a finding of guilt, and the judgment must be reversed.

II

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE TRIAL COUNSEL FAILED TO ASSERT APPELLANT'S DEFENSE, IN THAT HE DID NOT MAKE A MOTION FOR ACQUITTAL OR OTHERWISE ASSERT THE LEGAL INSUFFICIENCY OF THE EVIDENCE AGAINST APPELLANT, DID NOT OBJECT TO INADMISSIBLE HEARSAY OFFERED FOR THE PURPOSE OF DISCREDITING THE DEFENSE, AND DID NOT TAKE ANY EFFECTIVE STEPS TO CLEAR UP A STATE OF COMPLETE CONFUSION IN THE RECORD AS TO THE SIGNIFICANCE OF THE HEARSAY.

This Court has repeatedly held that:

"To constitute denial of the effective assistance of counsel guaranteed by the Sixth Amendment counsel must have been so incompetent or inefficient as to make the trial a farce or a mockery of justice." (PEEK vs. UNITED STATES, 9 Cir. 1963, 321 F.2d 934, 944. See also REID vs. UNITED STATES, 9 Cir. 1964, 334 F.2d 915, 919; BOUCHARD vs. UNITED STATES, 9 Cir. 1965, 344 F.2d 872, 874).

Such a showing can be made in few cases. Appellant respectfully submits that his is one of those few.

We have argued above that the evidence in the case at bar is legally insufficient under the applicable standard to support a conviction. Although trial counsel

:early took the position that the evidence did not
:stablish knowledge of the marijuana by his client, he at
ic time made a motion for acquittal or adopted any other
)rocedure which would have enabled the trial court to pass
ipon the issue. Even a minimum defense required such a
ic:ion, both to give the trial court an opportunity to
)ass upon the issue and to protect the defendant's rights
)r appeal.

During redirect examination of Customs Agent
Dhne Ellis by the Government on rebuttal, the following
)c:urred:

"BY MR. MILAM:

"Q. Did you check to see the Minuteman Car Wash in Mission Valley? Did you check that out at all?

"A. Yes. I called the manager, a Mr. Esquilera, of the Mission Car Wash in Mission Valley, yes; and I talked to him concerning the defendant.

"Q. Did you find out anything?

"A. He told me that Mr. Bojorquez had been laid off approximately four months ago because of the lack of work. I also discussed the point

of bringing automobiles and other vehicles into that area, and he said it was absolutely nay to all employees to bring any vehicles in the area to wash on their own; also, that they did not grant facilities to any persons to use their equipment to make -- for cleaning other cars." (R.T. 89).

Tis evidence, although it was clearly inadmissible harsay, was received without any objection by appellant's tial counsel. The failure to object is evidence of gross iadequacy of representation.

Having let the hearsay in, trial counsel was cnfronted with another question which he utterly failed to met. Did the hearsay declaration refer to the same car wsh about which appellant and Mr. Rodriguez testified?

As appears from the quoted portion of the transcipt, counsel for the Government asked about the Minuteman Cr Wash in Mission Valley, while Agent Ellis responded wth reference to the Mission Car Wash in Mission Valley. (.T. 89). On re-cross defense counsel elicited from M. Ellis the fact that there are two car washes. (R.T. 9). Ellis also said that in the interrogation at the tme of appellant's arrest, appellant referred to the

ission Car Wash. (R.T. 90). However, appellant testi-
id that it was the Minuteman. (R.T. 59). To complicate
atters further, on direct examination, Rodriguez said
hat he worked at Mission Valley Car Wash, but on
urebuttal it was Minuteman Car Wash in Mission Valley.
RT. 75, 92).

Manifestly, these facts have an explanation.
ither the hearsay referred to the car wash to which ap-
ellant said he was going at the time of his arrest, or it
id not. Having let the hearsay in, defense counsel was
nder a practical necessity of taking one position or the
ther. His witnesses were clearly able to testify whether
odriguez and Esquilera worked at the same car wash and,
f not, whether appellant had worked at both.

Although the burden of proof was at all times
on the Government, after appellant was put to his defense,
he Government's strongest case could be made by showing
hat appellant had made false statements either during his
riginal interrogation or at the trial. It is not un-
ikely -- indeed it is very probable -- that appellant was
onvicted by the jury on the theory that he was impeached
by the hearsay statement of the car wash manager to Agent
Ellis that employees were not permitted to wash auto-
obiles on their own. If appellant's trial counsel had
performed his duty, this never could have happened. Aside

from the fact that a motion for acquittal should have been granted at the conclusion of the Government's case and that the hearsay should not have been admitted in any event, it seems more probable than not that the hearsay did not even refer to the car wash in question, but related to another, at which appellant had worked before he was employed at the one in question. A conviction obtained under such circumstances is surely a mockery of justice.

CONCLUSION

The evidence in the case at bar conclusively established that appellant drove an automobile carrying marijuana from Mexico to the United States. The evidence tending to indicate that he did so with knowledge of the presence of the marijuana and intent to smuggle was wholly circumstantial. That evidence was insufficient to exclude the reasonable hypothesis that he did so innocently and without knowledge that the marijuana was in the car.

Appellant testified to an innocent reason for bringing the automobile into the United States and produced corroborative evidence. A motion for acquittal should have been granted, had his trial attorney made such a motion. He might well have been acquitted by the jury, but his counsel not permitted the introduction of inadmissible hearsay and then failed to use his witnesses to clarify confusion as to whether the hearsay was even applicable to the issue. These failures and omissions made a mockery of a good defense. The judgment of conviction should be reversed.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By_____
J. Perry Langford

Attorneys for Appellant

CERTIFICATE
(Rule 18-2(g))

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Perry Langford